No. 97-634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Does the Americans with Disabilities Act apply to inmates in state prisons?

LIST OF PARTIES

Respondent, Ronald R. Yeskey, filed this action against the Commonwealth of Pennsylvania, Department of Corrections; Joseph D. Lehman, in his former capacity as Secretary of the Department; Jeffrey A. Beard, in his former capacity as the Superintendent at the State Correctional Institution at Camp Hill; and Jeffrey K. Ditty, in his capacity as Director of the Central Diagnostic and Classification Center at the State Correctional Institution at Camp Hill.

Joseph D. Lehman has been succeeded by Martin F. Horn. The current Superintendent at the State Correctional Institution at Camp Hill is Kenneth Kyler.

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BRIEF FOR THE PETITIONERS

OPINIONS AND ORDERS ENTERED BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit are reported at 118 F.3d 168 (3d Cir. 1997) and are reprinted in the Joint Appendix at JA-122 to JA-135. The opinion and order of the United States District Court for the Middle District of Pennsylvania are not reported but are reprinted in the Joint Appendix at JA-95 to JA-100. The Magistrate Judge's Report and Recommendation were issued on January 23, 1996. The report and recommendation are not published but are reproduced in the Joint Appendix at JA-83 to JA-100.

STATEMENT OF JURISDICTION

On April 9, 1996, the United States District Court for the Middle District of Pennsylvania dismissed this action pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure. The judgment was reversed by the United States Court of Appeals for the Third Circuit on July 10, 1997. A timely petition for writ of certiorari was filed, and this Court granted certiorari on January 23, 1998. This Court has jurisdiction to review the Third Circuit's decision pursuant to 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Tenth Amendment to the Constitution of the United States provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The powers of Congress are enumerated in Article I, § 8 of the United States Constitution. Clause 3, the Commerce Clause, gives Congress the following power: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

The Americans with Disabilities Act ("ADA") is found at 42 U.S.C. §§ 12101-12213 and 47 U.S.C. §§ 225 and 611. The complete text of §§ 12101, 12102, and 12131-12134 is set forth verbatim in the appendix at A-1 to A-5.

The Rehabilitation Act of 1973 is found at 29 U.S.C. §§ 701-797b. The text of §§ 701 and 794 is set forth verbatim in the appendix at A-5 to A-9.

Pennsylvania's Motivational Boot Camp Act is found at Pa. Stat. Ann. tit. 61, §§ 1121-1129 (West Supp. 1997). The complete text is set forth verbatim in the appendix at A-9 to A-14.

The Department of Justice has issued regulations implementing Title II ("Public Services"), subtitle A ("Prohibition Against Discrimination and Other Generally Applicable Provisions"), of the ADA. Those regulations, entitled "Nondiscrimination on the Basis of Disability in State and Local Government Services," are located in part 35 of title 28 of the Code of Federal Regulations. The text of 28 C.F.R. §§ 35.130 and 35.150 (1998) is set forth verbatim in the appendix at A-15 to A-21.

STATEMENT OF THE CASE

In May 1994, the Court of Common Pleas of Westmoreland County sentenced the respondent, Ronald R. Yeskey, to serve 18 to 36 months in a Pennsylvania state prison. JA 6, Complaint, ¶ 9. The sentencing judge recommended Yeskey for placement in a motivational boot camp. JA 6, Complaint, ¶ 10.

Pennsylvania's boot camp was established pursuant to the Motivational Boot Camp Act, Pa. Stat. Ann. tit. 61, §§ 1121-1129 (West Supp. 1997). The boot camp provides, among other things, rigorous physical activity, intensive regimentation

and discipline, and work on public projects. Pa. Stat. Ann. tit. 61, § 1123. If an inmate successfully serves six months of his sentence at the boot camp, the inmate is released on parole for intensive supervision by the Pennsylvania Board of Probation and Parole. Pa. Stat. Ann. tit. 61, § 1127. Pursuant to Pennsylvania law, the Department of Corrections has the discretion to assign certain inmates to the boot camp. Pa. Stat. Ann. tit. 61, § 1126. In this regard, the Department is not required to follow the sentencing court's recommendation. Pa. Stat. Ann. tit. 61, § 1126(d).

In July 1994, prison officials told Yeskey that he was not eligible for placement in the motivational boot camp due to his medical history of hypertension. JA 6, Complaint, ¶ 11. In December 1994, Yeskey filed suit in the United States District Court for the Western District of Pennsylvania. JA 3. Yeskey claimed that the Department's refusal to place him in the boot camp violated his rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, the Eighth and Fourteenth Amendments, and the Pennsylvania Constitution. JA 3. The action was subsequently transferred to the United States District Court for the Middle District of Pennsylvania. JA 81.

On April 9, 1996, the district court held that the ADA is not applicable to state prisoners and dismissed Yeskey's complaint pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure. JA 100. On July 10, 1997, the United States Court of Appeals for the Third Circuit reversed and remanded for further proceedings in the district court. A petition for writ of certiorari was filed on October 8, 1997. Certiorari was granted on January 23, 1998.

SUMMARY OF ARGUMENT

The lower court erroneously concluded that Title II of the ADA is applicable to state prisoners and reinstated this lawsuit, which had been properly dismissed by the district court. In doing so, the court of appeals refused to apply an ordinary rule of statutory construction: Where Congress intends to alter

the usual balance of power between the state and federal governments, it must do so in unmistakable terms. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This Court has repeatedly recognized the sovereign nature of state prison management, emphasizing the need to give state prison administrators wide discretion in dealing with the unique problems of managing a volatile environment. *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Obviously, application of the ADA to state prisons would upset the balance of power by allowing federal regulation of a sovereign state function. Yet the text of the statute is ambiguous, at best, about its application to state prisons.

The ADA was enacted to integrate disabled citizens into the economic and social mainstream of public life, and it prohibits public entities from excluding any "qualified individual with a disability" from its "services, programs, or activities" on the basis of their disability. 42 U.S.C. § 12132 (1994). Although the term "public entity" is broadly defined to include states and their agencies, prisons are not expressly mentioned in the statute and are not normally considered to provide "services, programs, or activities" as those terms are commonly understood. The name given to Title II — "Public Services" — connotes a ban on discrimination in services provided to the public. Prisons do not provide services to the public; they intentionally isolate and confine individuals, against their will, from the rest of society. Rights to which prisoners would otherwise be entitled are necessarily and substantially restricted. *Price v. Johnston*, 334 U.S. 266, 285 (1948).

The ADA's ambiguity is plainly demonstrated by the fact that federal judges across this country have sharply disagreed on its application to state prisoners. Even in those circuits where the court of appeals found the ADA applicable to state prisoners, many of the district court judges — including the one in this case — had reached the opposite conclusion.

In the face of an ambiguous statute that will alter the usual balance of power if applied to state prisoners, the lower court should have applied the clear statement rule. Instead, the court deferred to regulations promulgated by the Department of Justice, which interpret the ADA as applicable to

state prisoners. Such deference is inappropriate where state sovereignty will be adversely affected, a fact which is underscored by the onerous regulations that have been promulgated to implement the ADA. Given the statute's severe impact on the balance of power between the state and federal governments, Congress should be required to state, in unmistakable terms, that it is intentionally invading state prison management – an area of historic state sovereignty.

Significantly, the clear statement rule complements another basic principle of statutory interpretation: Whenever possible, an act should be interpreted to reach a constitutional result. The ADA was ostensibly enacted pursuant to Congress's power to regulate commerce, as well as its power to enforce the Fourteenth Amendment. However, neither of those powers allows federal regulation of state prison systems.

Congress cannot be allowed to regulate state prisons through its Commerce Clause power; otherwise, it is difficult to perceive any limitation in an area where states have historically been sovereign. *United States v. Lopez*, 514 U.S. 549, 564 (1995). Prison administration is not a commercial activity nor does it substantially affect interstate commerce. When federal legislation impinges only upon state activities, the Court imposes a more stringent review, focusing on principles of federalism. *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997). For this reason, the federal government may not compel states to administer a federal regulatory program. *Id.* Such commands diminish public accountability and are fundamentally incompatible with dual sovereignty. *Id.* at 2384.

Likewise, congressional power to enforce the Fourteenth Amendment does not authorize Congress to engage in federal regulation of state prisons. Although broad, Congress's power is remedial, not substantive, and it does not override all principles of federalism. *Gregory*, 501 U.S. at 469; *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997). If the ADA encompasses matters of state prison management, it is not proper remedial legislation. Disabled prisoners do not enjoy protected status, and the ADA cannot grant them federally-enforceable rights that exceed those provided by the Constitution. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985); *City of Boerne*, 117 S. Ct. at 2170 (1997).

Undoubtedly, application of the ADA to state prisoners would raise serious questions about the statute's constitutionality – questions that can be avoided by reasonable application of the clear statement rule. *See Gregory*, 501 U.S. at 464. Because Congress has not clearly manifested an intent to apply the ADA to state prisoners, the act should be interpreted to exclude them from its scope.

ARGUMENT

I. FEDERAL REGULATION OF STATE PRISONERS WOULD INTRUDE ON A SOVEREIGN STATE FUNCTION.

A state's power to manage its own prisons is one of the most fundamental aspects of state sovereignty. *See Heath v. Alabama*, 474 U.S. 82, 93 (1985) (creating and enforcing a criminal code is foremost among a state's exclusive sovereign prerogatives); *Procunier v. Martinez*, 416 U.S. 396, 412 (1974) (maintaining prisons is an essential part of enforcing the criminal law). Under our system of federalism, "each state is wholly autonomous in the management of its correctional system," just as each state is autonomous in the management of its government and judicial systems. Warren E. Burger, *Factories with Fences: The Prison-Industries Approach to Correctional Dilemmas, in* 3 *Prisoners and the Law* 21-3, 21-6 (Ira P. Robbins ed., 1996). In fact, it "is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973).

The local nature of prison management is clearly demonstrated by the history of Pennsylvania's own correctional system, which traces its roots back more than a hundred years prior to ratification of the United States Constitution. Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania*

31-35 (1968). Pennsylvania's founder markedly changed the way crimes were punished throughout the world when William Penn's Great Law was enacted on December 7, 1682. For the first time in history, torture and mutilation were generally discarded in favor of a system of fines and imprisonment at hard labor in local jails. *Id.*

America's first penitentiary was built in Philadelphia in 1773; it became a state facility in 1789, forming the basis for the country's state prison systems. Negley K. Teeters, *The Cradle of the Penitentiary* 1 (1955). The first federal prison was not built until 1895, and only three federal prisons existed before 1925. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law,* 46 Hastings L.J. 1135, 1147 (April 1995). To this day, the states retain primary responsibility for matters of crime and punishment, and state prisons house the vast majority of prisoners. Lawrence M. Friedman, *Crime and Punishment in American History* 262 (1993). As recently as 1996, 94 percent of all prisoners in this country were still housed in correctional facilities controlled by state and local governments. Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics-1996,* Table 6.11 (1997).

In Pennsylvania, there are 35,000 state prisoners housed in 23 state prisons, 15 community corrections centers, and a motivational boot camp. Commonwealth of Pennsylvania, *1998-99 Governor's Executive Budget,* at E13.6; Camille Graham Camp and George M. Camp, *The Corrections Yearbook 1997* (Criminal Justice Institute 1998). Pennsylvania's prison population has increased 338 percent since 1980, when the state prison system housed only 8,000 inmates in seven state prisons and two regional correctional facilities. Camille Graham Camp and George M. Camp, *The Corrections Yearbook 1981* (Criminal Justice Institute 1982); Commonwealth of Pennsylvania, *Governor's Executive Budget 1980-81,* at 170. In this decade alone, Pennsylvania's prison population has nearly doubled, and the state has been forced to open nine new prisons. *Compare* Commonwealth of Pennsylvania, *1990-91 Governor's Executive Budget,* at E12.05 *with* Commonwealth of Pennsylvania, *1998-99 Governor's Executive Budget,* at E13.6. Despite constant expansion of its facilities, Pennsylvania's state prisons are still operating at approximately 150 percent of capacity. Commonwealth of Pennsylvania, *1998-99 Governor's Executive Budget,* at E13.11.[1]

Naturally, managing such a large, rapidly-growing prison population requires a delicate balance between operational and fiscal concerns and the paramount issue of security. "Behind the steel bars are murderers, robbers, rapists, drug dealers, extortionists, swindlers, child molesters, and people who are guilty of other equally ugly crimes." Daniel J. Bayse, *Working in Jails and Prisons: Becoming Part of the Team* 1 (American Correctional Association 1995). "Inmates are always looking for ways to beat the system and for ways to get staff members to help them do it." *Id.* at 34.

In prison, every single activity must take place with strict adherence to existing institutional routines, rules, and regulations. *Id.* at 18. "Incoming mail is opened and checked for contraband. Schedules are set. Meals are served at prescribed times. Even the serving trays and utensils are chosen with security in mind." *Id.* at 34. Of course, security concerns may also require that the daily routine and programs be cancelled at a moment's notice for reasons that may not be understood by those outside the prison walls. *Id.* at 16. Seemingly pointless prison rules are necessary to maintain discipline. For example, to prevent male inmates from escaping in female disguise, some prisons will not allow women to enter with lipsticks or wigs. *Id.* at 55.

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[1] These increases in Pennsylvania's prison population, and the corresponding burden to Pennsylvania's prison administration, have had a dramatic effect upon the taxpayers of Pennsylvania. For the 1980-81 fiscal year, for example, the Pennsylvania General Assembly appropriated less than $93 million for the use and operation of its state correctional facilities and community treatment centers. *See* 1980 Pa. Laws 1406. By comparison, for the 1998-99 fiscal year, Governor Ridge has proposed an operating budget for the state correctional facilities which is in excess of $1 billion dollars – an increase of more than 1,000 percent from the 1980-81 fiscal year. Commonwealth of Pennsylvania, *1998-99 Governor's Executive Budget,* at E13.10.

During incarceration, many rights enjoyed by private citizens must be curtailed, and inmates have little or no privacy. Windows or bars allow constant observation. *Id.* at 33. "For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State. . . ." *Preiser*, 411 U.S. at 492. Because body cavities offer a popular way to smuggle drugs throughout the correctional system, inmates are not even allowed to go to the toilet or shower in private. Bayse, at 33. Inmates are necessarily subjected to random strip searches, including examination of their body cavities, in order to keep weapons or other forms of contraband out of the prison. *Id.* "The threat is real. One Alabama prison has a copy of an x-ray mounted on the wall showing a small automatic pistol an inmate had hidden in his rectum." *Id.*

Indeed, this Court has recognized that the "problems of prisons in America are complex and intractable," and most of them "require expertise, comprehensive planning, and the commitment of resources." *Procunier*, 416 U.S. at 404. The adoption and execution of policies and practices to preserve internal order, discipline, and institutional security are "peculiarly within the province and professional expertise of corrections officers." *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979). These are fundamental, sovereign decisions that must be given great deference. *Id.*

Even those circuits that have found the ADA applicable to prisons have recognized that doing so may produce absurd results. The court below acknowledged the reality that federal courts will be used to reconstruct prison cells, to alter scheduling of inmate movements and assignments, and to interfere with security procedures. *Yeskey*, 118 F.3d at 174; JA 133. The Seventh Circuit conceded that a literal application of the statute to prisons may produce anomalies because the act is intended to "mainstream" disabled people. *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997). The court recognized that the "failure to exclude prisoners may

well . . . have been an oversight" but refused to create an exception in order "to save the statute from generating absurd consequences." *Id.* at 486-47.[2]

If the ADA is applied to prisons, states will be forced to implement federal policies, and state prisons will be subject to regulatory oversight by the Department of Justice. State officials will face constant litigation in which federal judges second-guess the reasonableness of administrative decisions, a practice repeatedly denounced by this Court. Undoubtedly, the normal balance of power between state and federal governments will be affected.

II. BASED ON THE CLEAR STATEMENT RULE, TITLE II OF THE ADA DOES NOT APPLY TO STATE PRISONERS.

When "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). This requirement "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). It is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

If Congress meant for the ADA to affect state prisons, the usual constitutional balance of power would clearly be altered. Yet, that intent is not reflected in the statutory lan-

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[2] The Ninth Circuit recently affirmed its position that both the ADA and the Rehabilitation Act of 1973 apply to state prisons. *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686). However, the court has explicitly recognized that the Rehabilitation Act "was not designed to deal specifically with the prison environment; it was intended for general societal application." *Gates v Rowland*, 39 F.3d 1439, 1446-47 (9th Cir. 1994). The same holds true with the ADA.

guage as a whole. Moreover, both the purposes and legislative history of the ADA are incompatible with a congressional decision to encroach on the states' sovereignty by interfering with matters of state prison management.

A. The text of Title II is ambiguous, at best, about its application to state prisoners.

This suit was brought under the provisions of Title II, "Public Services." However, nothing in that title indicates that Congress ever meant to extend its protections to state prisoners. Section § 12132 provides:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1994). The term "qualified individual with a disability" means:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

By definition, public entities include "any State . . . government" and "any department, agency, . . . or other instrumentality of a State or States." 42 U.S.C. § 12131(1)(A) and (B) (1994). The statute does not define what is meant by the terms "services, programs, or activities," and it is far from clear that Congress was attempting to intrude on matters of state prison management.

B. The ADA's findings, purposes, and legislative history demonstrate that Congress never intended for it to apply to state prisoners.

The ADA was enacted in response to pervasive discrimination against the disabled in mainstream America. Congress heard testimony from mothers, fathers, and children; from students and workers. All spoke eloquently about the daily problems they encounter in society as a result of their disabilities. *See* Arlene B. Mayerson, *Americans With Disabilities Act Annotated, Legislative History, Regulations & Commentary,* Volume I (1997).

In order to integrate disabled citizens into the economic and social mainstream of American public life, Congress enacted the ADA. House Comm. on Educ. and Labor, Americans With Disabilities Act of 1990, H.R. Rep. No. 101-485, pt. 2, at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303-04. The act promises "a future of inclusion and integration, and the end of exclusion and segregation." House Comm. on the Judiciary, H.R. Rep. No. 101-485, pt. 3, at 25-26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447-49.

The "Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8) (1994). Congress was troubled by "the continuing existence of unfair and unnecessary discrimination and prejudice" which "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101(a)(9). The "dependency and nonproductivity" of disabled individuals "costs the United States billions of dollars in unnecessary expenses." *Id.*

Reading these legislative findings, it is difficult to imagine that Congress ever envisioned that the ADA would be applied

to state prisoners.[3] Prison is not a free society, and all of the inmates are necessarily dependent on their custodians. Requiring state prison administrators to comply with the ADA will not reduce the costs of that dependency but will increase those costs dramatically. Prisons incarcerate a large percentage of individuals who will be able to claim some form of disability that will require special modifications of programs, services, or facilities. *See Yeskey*, 118 F.3d at 169; JA 124 (acknowledging that the question of the ADA's applicability to prisons is important, "especially in view of the increased number of inmates, including many older, hearing-impaired, and HIV-positive inmates, in the nation's jails"); *Bryant v. Madigan*, 84 F.3d 246, 248 (7th Cir. 1996) (pointing out the formidable practical problems presented by the fact that "alcoholism and other forms of addiction are disabilities within the meaning of the Act and afflict a substantial portion of the prison population").

Both the Seventh and Third Circuits have conceded that "the propensity of some [prisoners] to sue at the drop of a hat is well known; [and] prison systems are strapped for funds. . . ." *Yeskey*, 118 F.3d at 174; JA 132 (quoting *Crawford*, 115 F.3d at 486). If the ADA is applied in prisons, inmates will be able to manipulate state officials by forcing them to weigh the prospect of costly litigation against the cost of relenting to demands for unreasonable accommodations.

ADA litigation is very fact-intensive, requiring intrusive federal-court inquiries into virtually every aspect of prison

[3] Congress directed the Attorney General to implement the ADA by promulgating regulations consistent with the provisions of the ADA as well as regulations implementing § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994). 42 U.S.C. § 12134(a) and (b)(1994). Like the ADA, the introductory language of the Rehabilitation Act contains not even a hint that Congress intended its protections to apply to state prisoners. Rather, the Rehabilitation Act recognizes that "disability is a natural part of the human experience and in no way diminishes the right of individuals" to "live independently," "enjoy self-determination," "make choices," "contribute to society," "pursue meaningful careers," and "enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society." 29 U.S.C. § 701(a)(3) (1997). These are all rights that prisoners have forfeited for the duration of their confinement.

management. *See, e.g., Torcasio v. Murray*, 862 F. Supp. 1482, 1493-95 (E.D. Va. 1994), *aff'd in part, rev'd in part*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (examining whether showers, toilets, pod tables, cell doors, location of housing unit and cell, outdoor recreational activities and facilities, and indoor recreational activities were suitably modified for a morbidly obese inmate). The burdens that prisoner litigation places on state prison officials has been an area of immense concern for Congress and the courts.[4] It is nonsensical to think that Congress was trying to cut the costs of prisoners' dependency on state taxpayers by giving inmates yet another avenue of legal recourse against the states.[5]

[4] In 1996, Congress enacted the Prison Litigation Reform Act (PLRA), P.L. 104-134. The PLRA was designed to end micromanagement of state prisons by federal courts and to reduce the burdens of prisoner litigation. *See, e.g.*, 141 Cong. Rec. S14316-17 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) (making clear that PLRA seeks to curtail interference by the federal courts in the orderly administration of prisons); 141 Cong. Rec. S14611 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (noting the serious problem with the volume of lawsuits filed by prisoners, and the need to prevent prisoner litigation from needlessly interfering with prison administrators); 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (noting that the PLRA was intended to address the alarming explosion of prisoner lawsuits). The federal courts have also noted the important governmental interests in reducing the burdens of prisoner litigation. *See Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 117 S.Ct 2460 (1997) (finding that Congress had a legitimate interest in preserving state sovereignty from overzealous supervision by the federal courts in the area of prison conditions litigation); *Carson v. Johnson*, 112 F.3d 818 (5th Cir. 1997) (noting that deterring frivolous and malicious lawsuits is a legitimate state interest and that pro se civil rights litigation has become a "recreational activity" for many state prisoners). *See also* The 1997 Year-End Report on the Federal Judiciary at 5-6 (Chief Justice Rehnquist noting that Congress acted wisely in enacting the PLRA which has reduced the monthly civil rights filings by prisoners by 46%).

[5] The possible fiscal ramifications, and serious operational complications, of applying the ADA to prisoners are illustrated by a recent federal court decision. In *Purcell v. Pennsylvania Dep't of Corrections*, the United States District Court for the Eastern District of Pennsylvania held that the Commonwealth and its officials might even be required to pay *punitive* damages for violating an inmate's rights under the ADA. *See Purcell v. Pennsylvania Dep't of Corrections*, No. 95-6720, 1998 U.S. Dist. LEXIS 105, at *39 (E.D. Pa. Jan. 9, 1998). In that case, the plaintiff, Timothy Purcell, is

By the same token, Congress was obviously not referring to prisoners when it decried the fact that the disabled are relegated to a position of political powerlessness in our society. 42 U.S.C. § 12101(a)(7). Rather, Congress found persistent discrimination against disabled individuals "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, *institutionalization*, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3) (emphasis added). The court below erroneously equated the word "institutionalization" in § 12101(a)(3) with state prison systems. The legislative history reveals that the term "institutionalization" has nothing to do with prisons. Instead, it refers to the preceding finding — that discrimination against the disabled is a serious and pervasive problem because society has historically tended to isolate and segregate disabled individuals. 42 U.S.C. § 12101(a)(2).

In fact, the language of § 12101(a)(2) and (3) was taken, almost verbatim, from a report issued by the United States Commission on Civil Rights. *See* United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 159 (1983). The Commission stated:

> Historically, society has tended to isolate and segregate handicapped people. Despite some improvements, particularly in the last two decades, discrimination continues to be a serious and pervasive social problem. It persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation.

a state prisoner who allegedly suffers from Tourette's Syndrome, which is a neurological impairment characterized by motor and verbal tics (involuntary motor twitches, grunts, clicks, and shouts of obscenities), as well as coprolalia (the use of foul language, particularly of words relating to feces). Purcell was found guilty of misconduct for refusing to obey a direct order either to go to the infirmary for his scheduled medical appointment or to sign a release from medical treatment. The district court denied summary judgment based, in part, on its conclusion that prison officials "had an obligation to 'accommodate' Purcell's Tourette's by permitting him to return to his cell when he needed to release his verbal and motor tics." *Id.* at *26. The court found that it is important to allow Purcell to "release these symptoms in private to avoid the embarrassment of 'exploding' in front of others." *Id.* at *3.

Id. The Commission's report focuses on the systematic placement of handicapped people in substandard residential institutions, where they are segregated from their families, normal society, peer groups, and members of the opposite sex. *Id.* at 32-35. That report was entered as testimony before House and Senate subcommittees and later quoted in the committee reports. Senate Comm. on Labor and Human Resources, S. Rep. No. 101-116, at 8 (1989); House Comm. on Educ. and Labor, H.R. Rep. No. 101-485, pt. 2, at 31 (1990).

Moreover, during the floor debates, Congress expressed concern about the common practice of institutionalizing, segregating, and isolating persons with disabilities when it was neither necessary nor appropriate. 135 Cong. Rec. S4993 (daily ed. May 9, 1989) (statement of Sen. Kennedy). Throughout the country, individuals with developmental disabilities were forced to live in large-scale residential institutions for handicapped people. United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 32-33(1983). The vast majority of those residents did not need to be segregated and were being "denied the opportunity to control their own lives." 135 Cong. Rec. S4994 (daily ed. May 9, 1989) (statement of Sen. Durenberger).

It is evident that Congress was concerned about the practice of institutionalizing individuals because of their disabilities; Congress was not concerned about institutionalizing people because of their criminal conduct. Isolation and segregation are an accepted and necessary management tool in all prison systems because managing prison inmates is very different from serving the general public. Inmates are often violent and manipulative. They are in prison, confined against their will, because of their refusal to obey the law. Rights to which they would otherwise be entitled are necessarily and substantially restricted. *See Price v. Johnston*, 334 U.S. 266, 285 (1948)

("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

Prison administrators need to be given broad latitude to manage state prisons, limited only by constitutional requirements. *See Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989). Nothing in the ADA or its legislative history indicates that Congress considered the complex problems of prison administration and, nonetheless, decided to meddle in decisions of the most fundamental sort for a state sovereign.

C. The sharp disagreement among federal courts on the ADA's applicability to state prisoners proves its ambiguity and compels application of the clear statement rule.

As illustrated above, it is unclear whether Title II of the ADA was meant to encompass the management of state prisoners. This ambiguity is plainly demonstrated by the fact that federal judges across this country sharply disagree on the issue.[6]

The court below held that the statute is not ambiguous and clearly covers state prisoners. The court was heavily influenced by the Seventh Circuit's opinion in *Crawford*, and quoted from it extensively. *See Yeskey*, 118 F.3d at 173-74; JA 130-132. Yet, even the author of *Crawford* has vacillated on the statute's clarity.

[6] Indeed, even in those circuits where the court of appeals eventually held that the ADA does apply to state prisoners, many district court judges disagreed. For example, the Third Circuit's decision in *Yeskey* and the Seventh Circuit's decision in *Crawford* both *reversed* district court opinions holding that the ADA did not apply to state prisoners. *Yeskey*, 118 F.3d at 170; JA 124; *Crawford*, 115 F.3d at 487. *See also Longo v. Barbo*, No. 94-3919, 1996 U.S. Dist. LEXIS 11453, *1, *3 (D.N.J. Aug. 9, 1996) (finding that it was not clearly established that either the ADA or the Rehabilitation Act applied to prisoners; the language of the act is "not so broad" as to clearly apply and the court found it doubtful that Congress intended to enhance "so dramatically" a disabled prisoner's constitutional rights); *Little v. Lycoming County*, 912 F. Supp. 809 (M.D. Pa. 1996), *aff'd without op. sub nom., Little v. Smith*, 101 F.3d 691 (3d Cir. 1996) (following *Torcasio* to find that the ADA was inapplicable to state prisons absent a clear expression of congressional intent); *King v. Edgar*, No. 96 C 4137, 1996 U.S. Dist. LEXIS 17999 (N.D. Ill. Dec. 4, 1996) (finding no indication Congress meant the ADA to be applied to state prisons); *Fowler v. Gomez*, No. C 94-2679, 1995 U.S. Dist. LEXIS 19543 (N.D. Cal. Nov. 22, 1995) (finding the ADA's applicability to state prisons was not clearly established).

Only a year before he wrote the opinion in *Crawford*, Chief Judge Posner believed that the statute was unclear. *See Bryant v. Madigan*, 84 F.3d at 248. Writing for the court, Chief Judge Posner expressed strong doubts about the ADA's applicability in the prison context:

> *It is very far from clear* that prisoners should be considered "qualified individual[s]" within the meaning of the Act. Could Congress really have intended disabled prisoners to be mainstreamed into an already highly restricted prison society? Most rights of free Americans, including constitutional rights such as the right to free speech, to the free exercise of religion, and to marry, are curtailed when asserted by prisoners; and there are formidable practical objections to burdening prisons with having to comply with the onerous requirements of the Act, especially when we reflect that alcoholism and other forms of addiction are disabilities within the meaning of the Act and afflict a substantial proportion of the prison population . . . . Judge-made exceptions to laws of general applicability are justified to avoid absurdity. And an exception to the Americans With Disabilities Act for prisoners, though not express, may have textual foundation in the term "qualified individual."

Id. at 248-49 (internal citations omitted) (emphasis added).

The Fourth Circuit has thoughtfully reviewed the opinions of the Third, Seventh, and Ninth Circuits and explicitly rejected them. In a thorough and well-reasoned opinion, the Fourth Circuit pointed out numerous ambiguities in the statutory text "which reveal that Congress failed to speak with unmistakable clarity on the issue of whether the . . . ADA appl[ies] to state prisons." *Amos v. Maryland Dep't of Pub. Safety and Correctional Services*, 126 F.3d 589, 600 (4th Cir.

1997), *petition for cert. filed*, 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113). Although the definition of "public entity" is broad, prisons are not expressly mentioned in the statute and "they certainly do not come readily to mind as the type of institution covered." *Id.* at 596. The court noted that even "the name ascribed to Title II of the ADA – 'Public Services' – connotes a ban on discrimination in services provided to the public, not in the prison context where the public is excluded." *Id.* State prisons "thus do not fit neatly within the definition of 'public entities' to which the ADA applies. . . ." *Id.*

Moreover, the ADA defines a "qualified individual with a disability" as a person who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities." 42 U.S.C. § 12131. "The terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind prisoners who are being held against their will." *Id.* Correctional facilities "do not provide 'services,' 'programs,' or 'activities' as those terms are ordinarily understood." *Amos*, 126 F.3d at 600. Incarceration requires the provision of a place to sleep and eat. It is not a "program" or "activity." *Id.* at 601. The operations of state prisons fall naturally within the statutory terms "services," "programs," and "activities" only when particular services, activities, or programs are divorced from the context of correctional facilities. *Id.* For example, a family outing to the local public library falls quite naturally within the common understanding of the meaning of "activity." However, a prisoner's use of a court-mandated prison law library does not fall naturally within the ambit of that statutory term. *Id.* The Fourth Circuit notes that "most prison officials would be surprised to learn that they were" required to provide inmates with "services," "programs," or "activities" as those terms are ordinarily understood. *Id.*

Plainly, the circuits are sharply divided on the ADA's applicability to state prisoners. This debate has been heated at times. For instance, the court below rejected the Fourth Circuit's reasoning as "seriously flawed." *Yeskey*, 118 F.3d at 172; JA 129 (criticizing *Torcasio*, 57 F.3d at 1344-46). The Fourth

Circuit responded by criticizing the Third, Seventh, and Ninth Circuits for engaging in "interpretive gymnastics" and characterized the Third and Seventh Circuits as "contortionists." *Amos*, 126 F.3d at 600. Each circuit remains firmly convinced of its view, and those views are diametrically opposed to each other. This fact, in and of itself, should make it plain that Congress has not spoken with anywhere near the clarity required to alter the usual federal-state balance of power.

D. The lower court should have applied the clear statement rule instead of deferring to regulations promulgated by the Department of Justice.

Despite the ambiguous nature of the ADA's application to state prisoners, the lower court refused to apply the clear statement rule in this case. *Yeskey*, 118 F.3d at 173; JA 130. Instead, the court deferred to regulations promulgated by the Department of Justice, which interpret the ADA as applicable to prisons. *Id.* at 171; JA 127. Such deference is inappropriate when application of an ambiguous federal statute would upset the usual constitutional balance. *See Gregory*, 501 U.S. at 466 (requiring a clear statement of congressional intent in the statutory text, despite the view of two dissenting justices who felt that the Court should have deferred to administrative interpretations of the statute).

As the Fourth Circuit pointed out in *Amos*, the regulations promulgated under the ADA are incredibly intrusive when applied to a traditionally sensitive function such as state prison administration:

> Like the byzantine UFAS standards, the ADAAG standards intricately regulate the construction or modification of existing covered facilities and consume 129 pages of the Code of Federal Regulations. *See* 36 C.F.R. pt. 1191, app. A, at 663-792. ADAAG requirements specific to "detention and correctional facilities" address, *inter alia*, specifications for prison visiting areas, medical care facilities, and restrooms; the "dispersion" of "accessible cells" within the correctional facility; accommodations for inmates with

> hearing impairments; and the appropriate height of prison beds. *See id.* at 782-84.

Amos, 126 F.3d at 606.

The onerous nature of these regulations should make it obvious that the ADA's application to state prisoners has enormous implications on the balance of power between the federal and state governments. The ADA will force state prison officials to expend limited state funds in accordance with this federal scheme, rather than in accordance with constitutional requirements and state law.

Given the statute's impact on the federal balance, the clear statement rule should be applied — requiring Congress to state, in unmistakable terms, that it is intentionally invading an essential function of state sovereignty. Congress certainly has not done so in the ADA.

E. To avoid an unconstitutional result, the ADA cannot apply to state prisoners.

Significantly, the clear statement rule complements another basic rule of statutory construction: Whenever possible, an act should be interpreted to reach a constitutional result. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); *Gregory*, 501 U.S. at 464 ("Application of the plain statement rule thus may avoid a potential constitutional problem."). In our federalist system, application of the ADA to prison management would not be a constitutional result.

In § 12101(b)(4) of the ADA, Congress announced its intent "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). Neither, the Commerce Clause nor the

Fourteenth Amendment gives Congress the power to regulate the management of state prisoners.

1. The Commerce Clause does not authorize federal regulation of state prisons.

The term "commerce" describes "the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *United States v. Lopez*, 514 U.S. 549, 553 (1995) (quoting *Gibbons v. Ogden* 22 U.S. (9 Wheat.) 1, 189-90 (1824)). Using its Commerce Clause powers, Congress can regulate three broad areas:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

Lopez, 514 U.S. at 558-59 (internal citations omitted). The issue in this case is whether fundamental decisions regarding management of state prisoners substantially affect interstate commerce.[7] To answer this question, the Court must assess: (1) whether Congress has a rational basis for finding that the regulated activity affects interstate commerce; and (2) if so, whether the means it selected to eliminate the particular evil are reasonable and appropriate. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981);

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[7] Admittedly, some aspects of state prison administration do affect interstate commerce and can be regulated by Congress. *See, e.g.*, 18 U.S.C. § 1761(c) (1997) (allowing participants in nearly fifty non-federal pilot projects to sell their goods in interstate commerce if their programs meet certain statutory requirements). Nevertheless, congressional authority to regulate the interstate transportation of commercial goods used or produced in state prisons does not include the authority to regulate each and every aspect of those prisons. *See Lopez*, 514 U.S. at 565-66 (Congress does not have the authority to regulate every aspect of local schools).

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964).

When federal legislation impinges only upon state activities, this Court imposes a more stringent review, focusing on principles of federalism. *See Printz v. United States*, 117 S. Ct. 2365, 2383 (1997). This requirement maintains the important distinction between what is truly national and what is of local concern. *Lopez*, 514 U.S. at 567-68. Laws that implement the Commerce Clause, but violate principles of state sovereignty, are acts of usurpation which deserve to be treated as such. *Id.* at 2379. For this reason, the "Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.* at 2383 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)). "[S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* at 2384.

Title II of the ADA invades the states' sovereignty by requiring prison administrators to implement a complex and costly regulatory scheme — a practice recently condemned by this Court in *Printz*:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solution with higher taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. . . .

Printz, 117 S. Ct. at 2382. Public accountability is diminished when "elected state officials cannot regulate in accordance with the views of the local electorate" because state officials may "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decisions." *New York*, 505 U.S. at 169.

Similarly, if state prison administrators are required to implement the ADA, it will be the states that must shoulder

the costs. The lower court has conceded that prison systems are strapped for funds, and "the practical effect of granting disabled prisoners rights of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off." *Yeskey*, 118 F.3d at 174; JA 132 (quoting *Crawford*, 115 F.3d at 486). It will be state officials, not the federal government, who will have to take the blame for that outcome.

In the end, if Congress is allowed to regulate the states' sovereign ability to manage their own prisoners, it is difficult to perceive any limitation on federal power in an area where states historically have been sovereign. *See Lopez*, 514 U.S. at 564 (rejecting governmental theories that would allow federal regulation of areas of state sovereignty, such as criminal law enforcement or education).

2. The Fourteenth Amendment does not authorize federal regulation of state prisons.

Just as the Commerce Clause does not give Congress the power to engage in federal regulation of state prison systems, neither does the Fourteenth Amendment. Section 5 of the Fourteenth Amendment gives Congress a broad, but limited, enforcement power. *Gregory*, 501 U.S. at 469. That power is remedial, not substantive, *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997), and it does not override all principles of federalism. *Gregory*, 501 U.S. at 469. It is not always easy to discern the line between measures that remedy or prevent unconstitutional actions and those that make a substantive change in the law, but the distinction exists and must be observed. *City of Boerne*, 117 S. Ct. at 2164.

In *City of Boerne*, this Court struck down the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, because Congress had tried to use its § 5 enforcement power to expand the substantive right to free exercise of religion. Legislation that alters the meaning of a constitutional provision does not "enforce" that provision. *Id.* If Congress could define its own powers by altering the Fourteenth

Amendment's meaning, "it is difficult to conceive of a principle that would limit congressional power." *Id.* at 2168.

Legislation is not appropriate under the Fourteenth Amendment unless it: (1) may be regarded as an enactment to enforce the Equal Protection Clause; (2) is plainly adapted to that end; and (3) is not prohibited by, but is consistent with, "the letter and spirit of the constitution." *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966). The Court recently explained the analysis this way: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *City of Boerne,* 117 S. Ct. at 2164.

If the ADA encompasses matters of state prison management, it is not proper remedial legislation. In mainstream America, the ADA may represent a "congruence between the means used and the ends to be achieved." *Id.* at 2169. Thus, when applied to services, programs, and activities provided to the public, the statute may be "proportionate to ends legitimate under § 5." *Id.* at 2171. However, the same cannot be said of the ADA if it was intended to apply to state prisoners. Nothing in the legislative history even hints that discrimination against disabled state prisoners is a widespread problem that demands a federal remedy. The legislative history focuses exclusively on the burdens faced by the disabled in public life, not in state prison systems.

Where it has not identified a problem, Congress cannot craft a remedy pursuant to its § 5 enforcement power. It surely cannot expand Fourteenth Amendment protections to create a new substantive right. *Id.* at 2169 (contrasting the voting rights cases to RFRA's legislative record, which lacked examples of purposeful discrimination based on religious bigotry that required remedial measures); *see also The Civil Rights Cases,* 109 U.S. 3, 18 (1883) (explaining that appropriate legislation corrects the effects of offensive state action and provides modes of relief).

As a general rule, states are given wide latitude in classifying individuals for differing types of treatment. *City of Cleburne,* 473 U.S. at 440. Naturally, that general rule gives way when the differing treatment is based on suspect characteristics such as race, alienage, and national origin because those criteria are rarely relevant to any legitimate state interest. *Id.* Consequently, classifications based on these factors are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *Id.* Similar oversight by the courts is due when state laws impinge on fundamental rights protected by the Constitution. *Id.*

In addition to suspect classes that require strict scrutiny, this Court has designated some less-suspect classes that must receive heightened, but not strict, scrutiny. For example, a gender classification receives "heightened scrutiny" and will not be upheld unless it is substantially related to a "sufficiently important governmental interest." *Id.* at 440-41. Classifications based on illegitimacy receive "somewhat heightened scrutiny," and they must be substantially related to a "legitimate state interest." *Id.* at 441.

In contrast to these suspect classifications, this Court has identified other characteristics — such as age, mental retardation, intelligence, and physical disability — as nonsuspect statuses which are not entitled to heightened review despite differential treatment by state officials. *Id.* at 439, 445-46. In those cases, state legislation or other official action is presumed valid and will be sustained if the classification is rationally related to a legitimate state interest. *City of Cleburne,* 473 U.S. at 440. In the equal protection analysis, rational-basis review does not give the courts license to judge the wisdom, fairness, or logic of state policy decisions. *See Heller v. Doe,* 509 U.S. 312, 319 (1993). A classification must be upheld against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and a state has no obligation to produce evidence to sustain the rationality of its decision. *Id.* at 320 (quoting *Beach Communications, Inc.,* 508 U.S. 307, 313 (1993)).

Significantly, this Court has already decided that equal protection scrutiny will "not be so demanding where we deal

with matters resting firmly within a State's constitutional prerogatives." *Gregory*, 501 U.S. at 469.[8] Therefore, even when the highest level of scrutiny would otherwise apply, prison regulations are valid as long as they bear a reasonable relationship to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1989) (refusing to apply a heightened, "less restrictive alternative" standard in upholding prison regulation that adversely affected prisoners' ability to attend important religious service). When prisoners are classified based on nonsuspect criteria, such as an inmate's physical or mental disabilities, deference should be paid to that administrative decision unless it lacks any rational basis. *See City of Cleburne*, 473 U.S. at 445-46 (noting that disability is a nonsuspect status); *Gregory*, 501 U.S. at 470-71 (noting that where a classification burdens neither a suspect group nor a fundamental interest, the state need only assert a rational basis for its classification because "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws").

Once this Court has determined the requisite level of equal protection scrutiny, Congress does not have the power to heighten that requirement. *City of Boerne*, 117 S. Ct. at 2172 (finding it unconstitutional for Congress to pass legislation raising the level of scrutiny required by this Court's prior precedent). This Court has already determined the appropriate level of equal protection scrutiny in the prison setting, and

[8] In *Gregory*, this Court pointed to Tenth Amendment limitations on Congress's § 5 enforcement power in a series of cases that included *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979); and *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). *Gregory*, 501 U.S. at 461-63. Those cases concerned the state's power to define the qualifications of "competitive civil service workers" (*Sugarman*), state troopers (*Foley*), public schoolteachers (*Ambach*), and deputy probation officers (*Cabell*). In each case, aliens challenged the state statutes, which denied them employment in those particular fields. Only the statute in *Sugarman* was struck down because it was a blanket prohibition on a broad category of public jobs; it "swe[pt] indiscriminately" and was "neither narrowly confined nor precise in its application." *Sugarman*, 413 U.S. at 643.

Congress does not have the power to change that standard. The ADA simply cannot be applied to state prisons without altering the level of scrutiny afforded to prisoners' equal protection claims.

The ADA does not merely prohibit "discrimination" against disabled prisoners. It will require prison officials to grant special privileges to certain inmates and to excuse others from complying with generally-applicable prison rules. *See, e.g., Purcell v. Pennsylvania Dep't of Corrections*, No. 95-6720, 1998 U.S. Dist. LEXIS 105, *1, *22 (E.D. Pa. Jan. 9, 1998) (inmate with Tourette's syndrome stated a claim under the ADA where he received a misconduct write-up for refusing to report for a medical appointment because he needed to return to his cell and privately "explode" his built-up motor and verbal tics). The sweeping intrusions of the ADA and its regulations will profoundly affect sound prison management. The states will be required to expend substantial financial resources to meet the ADA's regulatory schemes, and they will lose the ability to balance internal security with operational and fiscal concerns.

For example, prison officials will be prohibited from denying a disabled inmate "the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. § 35.130(b)(2). Arguably, the state could not cluster specialized services for its disabled prisoners in certain prison facilities so as to provide these services in an efficient and cost-effective manner. The state may very well have to make mental health treatment centers, services for hearing-impaired inmates, dialysis treatment, and the like available at *every* facility. Even prison regulations that are intended to benefit disabled inmates could run afoul of the ADA. Segregating disabled inmates from the general population to protect them from bigger, more violent, and manipulative inmates might subject prison officials to a searching judicial inquiry into alternative ways of including the disabled in the general population.

If the ADA applies to prisons, the decisions of state officials will not be given the deference due them under prior precedent of this Court. Instead, state officials will have to prove that a particular administrative decision was not only reasonable, but that it was the only choice which would not cause them undue hardship or fundamentally alter their programs and services. *See* 28 C.F.R. § 35.150(3) (stating that a public entity has the burden of proving that it cannot operate its services, programs, or activities in an accessible manner without (1) fundamentally altering the nature of that service, program or activity, or (2) incurring undue financial and administrative burdens). Prison officials will have to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," unless the officials demonstrate that "making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7). *See also Crawford,* 115 F.3d at 483 (noting that prison officials can exclude prisoners from programs and activities if they can show that there is no reasonable accommodation that would enable the disabled prisoner to participate in the programs and activities in question or that making the necessary accommodation would place an undue burden on the prison system); *Yeskey,* 118 F.3d at 174; JA 132 (agreeing with *Crawford* that prison officials may not exclude a disabled person from the dining hall unless it would place an undue burden on prison management).

By placing this burden of proof on state officials, the federal government comes very close to requiring states to meet the "least restrictive means" test. This Court has refused to impose that kind of burden on prison officials, even where prison regulations have infringed on fundamental constitutional rights. *Turner,* 482 U.S. at 90. Prison regulations are considered valid if they are reasonably related to legitimate penological interests:

> This is not a "least restrictive alternative" test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Id. (internal citation omitted). Requiring state officials to accommodate prisoners' rights at a *de minimis* cost to valid penological interests is a far cry from requiring accommodation unless state officials can affirmatively prove an undue burden on prison administration or a fundamental alteration of programs, services, and activities. *Compare O'Lone,* 482 U.S. at 350 (refusing to burden prison officials with disproving the availability of alternative methods of accommodating the prisoners' demands even though prison work rules prevented some inmates from attending religious services that were central to their beliefs); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 128 (1977) (holding that burden was not on prison officials to affirmatively establish that a prisoners' union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order").

The case before this Court vividly demonstrates why application of the ADA to prisoners would create substantive rights that greatly exceed constitutional requirements. Under federal law, a prisoner has no right to compel confinement in any particular institution or participation in any particular program. *See Meachum v. Fano,* 427 U.S. 215, 224 (1976) (prisoner has no right to be housed in a particular institution); *Moody v. Daggett,* 429 U.S. 78, 88 n.9 (1976) (no entitlement to participation in rehabilitative program). Similarly, under Pennsylvania law, an inmate has no right to participate in the Department's motivational boot camp. Pa. Stat. Ann. tit. 61, § 1126. Here, Yeskey claims that he was denied participation in the boot camp because of his "disability." Consequently, the ADA could grant him the legal right to that placement unless Pennsylvania can affirmatively prove that its boot camp can-

not be modified to accommodate Yeskey's hypertension without fundamentally altering the key elements of that program.

If the ADA is applied in the prison context, it will create substantive rights that greatly exceed the prisoners' constitutional rights, and the act will suffer from many of the same fatal flaws as RFRA, the statute struck down in *City of Boerne*. Both statutes place the burden on state officials to establish why a proposed change in their practice, rule, procedure, or policy would harm some other important state interest. In RFRA, the state officials were required to show that the proposed accommodation would harm a "compelling state interest," and that the state's action was the "least intrusive means" for protecting that compelling interest. Similarly, the ADA would require state prison officials to affirmatively prove that any proposed modification would adversely affect a fundamental aspect of the state program or cause an undue burden on the state – a test which closely parallels the "least restrictive means" standard.

In sum, the ADA simply cannot be applied to prisons without being "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 117 S. Ct. at 2170. "It appears, instead, to attempt a substantive change in constitutional protections." *Id.* This is something Congress cannot do.

CONCLUSION

"The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." *Lopez*, 514 U.S. at 562 (quoting *United States v. Five Gambling Devices Etc.*, 346 U.S. 441, 448 (1953)(plurality opinion)). The clear statement rule can be used to avoid a statutory interpretation that would affect the normal federal-state balance of power. *See Gregory*, 501 U.S. at 464 ("Application of the plain statement rule thus may avoid a potential constitutional problem.").

As in *Gregory*, all of the difficult constitutional concerns discussed above can be avoided by reasonable application of the clear statement rule. Whether the ADA applies to state prisons is ambiguous at best. "In the face of such an ambiguity," this Court "will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." *Gregory*, 501 U.S. at 469. Because Congress has not clearly manifested an intent to apply the ADA to state prisoners, the act must be interpreted to exclude them from its scope.

For these reasons, petitioners respectfully ask this Court to reverse the decision of the United States Court of Appeals for the Third Circuit and remand with instructions to affirm the judgment entered on April 9, 1996, by the United States District Court for the Middle District of Pennsylvania, which dismissed this action in its entirety.

Respectfully submitted,

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APPENDIX

AMERICANS WITH DISABILITIES ACT OF 1990
42 U.S.C. §§ 12101 – 12102; 12131 – 12134 (1994)

§ 12101. Findings and purpose

(a) Findings. The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER II – PUBLIC SERVICES

PART A – PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

§ 12131. Definition

As used in this subchapter:

(1) Public entity. The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) **In general.** Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations. Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) shall be consistent with this chapter and with the coordination regulations under part 41 of

title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of title 29.

(c) Standards. Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

REHABILITATION ACT OF 1973
29 U.S.C. §§ 701, 794 (1994)

§ 701. Findings; purpose; policy

(a) Findings. Congress finds that –

(1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;

(2) individuals with disabilities constitute one of the most disadvantaged groups in society;

(3) disability is a natural part of the human experience and in no way diminishes the right of individuals to –

(A) live independently;

(B) enjoy self-determination;

(C) make choices;

(D) contribute to society;

(E) pursue meaningful careers; and

(F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society;

(4) increased employment of individuals with disabilities can be achieved through the provision of individualized training, independent living services, educational and support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services; and

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to –

(A) make informed choices and decisions; and

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

(b) Purpose. The purposes of this chapter are –

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through –

(A) comprehensive and coordinated state-of-the-art programs of vocational rehabilitation;

(B) independent living centers and services;

(C) research;

(D) training;

(E) demonstration projects; and

(F) the guarantee of equal opportunity; and

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with

disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

(c) Policy. It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of –

(1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;

(2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals;

(3) inclusion, integration, and full participation of the individuals;

(4) support for the involvement of a parent, a family member, a guardian, an advocate, or an authorized representative if an individual with a disability requests, desires, or needs such support; and

(5) support for individual and systemic advocacy and community involvement.

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regu-

lation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers. Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

PENNSYLVANIA'S MOTIVATIONAL BOOT CAMP ACT
18 Pa. Stat. Ann. tit. 61, §§ 1121-1129 (West Supp. 1997)

§ 1121. Short title

This act shall be known and may be cited as the Motivational Boot Camp Act.

§ 1122. Declaration of policy

The General Assembly finds and declares as follows:

(1) The Commonwealth recognizes the severe problem of overcrowding in State and county prisons and understands that overcrowding is a causative factor contributing to insurrection and prison rioting.

(2) The Commonwealth also recognizes that the frequency of convictions responsible for the dramatic expansion of the prison population is attributable in part to the increased use of drugs and alcohol.

(3) The Commonwealth, in wishing to salvage the contributions and dedicated work which its displaced citizens may

someday offer, is seeking to explore alternative methods of incarceration which might serve as the catalyst for reducing criminal behavior.

§ 1123. Definitions

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Commission." The Pennsylvania Commission on Sentencing.

"Department." The Department of Corrections of the Commonwealth.

"Eligible inmate." A person sentenced to a term of confinement under the jurisdiction of the Department of Corrections who is serving a term of confinement, the minimum of which is not more than two years and the maximum of which is five years or less or an inmate who is serving a term of confinement the minimum of which is not more than three years where that inmate is within two years of completing his minimum term, and who has not reached 35 years of age at the time he is approved for participation in the motivational boot camp program. The term shall not include any inmate who is subject to a sentence the calculation of which included an enhancement for the use of a deadly weapon as defined pursuant to the sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing or any inmate serving a sentence for any violation of one or more of the following provisions:

18 Pa.C.S. § 2502 (relating to murder).

18 Pa.C.S. § 2503 (relating to voluntary manslaughter).

18 Pa.C.S. § 2506 (relating to drug delivery resulting in death).

18 Pa.C.S. § 2901 (relating to kidnapping).

18 Pa.C.S. § 3121 (relating to rape).

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

18 Pa.C.S. § 3124.1 (relating to sexual assault).

18 Pa.C.S. § 3125 (relating to aggravated indecent assault).

18 Pa.C.S. § 3301(a)(1)(i) (relating to arson and related offenses).

18 Pa.C.S. § 3502 (relating to burglary) in the case of burglary of a structure adapted for overnight accommodation in which at the time of the offense any person is present.

18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery).

18 Pa.C.S. § 3702 (relating to robbery of motor vehicle).

18 Pa.C.S. § 7508 (a)(1)(iii), (a)(2)(iii), (a)(3)(iii) or (a)(4)(iii) (relating to drug trafficking sentencing and penalties).

"Motivational boot camp." A program in which eligible inmates participate for a period of six months in a humane program for motivational boot camp programs which shall provide for rigorous physical activity, intensive regimentation and discipline, work on public projects, substance abuse treatment services licensed by the Department of Health, ventilation therapy, continuing education, vocational training and prerelease counseling.

"Secretary." The Secretary of Corrections of the Commonwealth.

§ 1124. Selection of inmate participants

(a) Duties of commission.—Through the use of sentencing guidelines, the commission shall employ the definition of "eligible inmate" as provided in this act to further identify inmates who would be appropriate for participation in a motivational boot camp.

(b) Duties of sentencing judge.—The sentencing judge shall employ the sentencing guidelines to identify those defendants who are eligible for participation in a motivational boot camp. The judge shall have the discretion to exclude a defendant from eligibility if the judge determines that the defendant would be inappropriate for placement in a motivational boot

camp. The judge shall note on the sentencing order whether the defendant has been identified as eligible for a motivational boot camp program.

(c) Duties of department.—The secretary shall promulgate rules and regulations providing for inmate selection criteria and the establishment of motivational boot camp selection committees within each diagnostic and classification center of the department.

§ 1125. Establishment of motivational boot camp program

(a) Establishment.—There is hereby established in the department a motivational boot camp program.

(b) Program objectives.—The objectives of the program are:

(1) To protect the health and safety of the Commonwealth by providing a program which will reduce recidivism and promote characteristics of good citizenship among eligible inmates.

(2) To divert inmates who ordinarily would be sentenced to traditional forms of confinement under the custody of the department to motivational boot camps.

(3) To provide discipline and structure to the lives of eligible inmates and to promote these qualities in the postrelease behavior of eligible inmates.

(c) Rules and regulations.—The secretary shall have the duty to promulgate rules and regulations which shall include, but not be limited to, inmate discipline, selection criteria, programming and supervision, and administration. The department shall provide four weeks of intensive training for all staff prior to the start of their involvement with the program.

(d) Approval.—Motivational boot camp programs may be established only at correctional facilities classified by the secretary as motivational boot camp facilities.

(e) Evaluation.—The department and the commission shall monitor and evaluate the motivational boot camp programs to ensure that the programmatic objectives are met. Both shall present annual reports of the evaluations of the Judiciary Committees of the House of Representatives and Senate no later than February 1 of each year.

§ 1126. Procedure for selection of participant in motivational boot camp program

(a) Application.—An eligible inmate may make an application to the motivational boot camp selection committee for permission to participate in the motivational boot camp program.

(b) Selection.—If the selection committee determines that an inmate's participation in the program is consistent with the safety of the community, the welfare of the applicant, the programmatic objectives and the rules and regulations of the department, the committee shall forward the application to the secretary or his designee for approval or disapproval.

(c) Conditions.—Applicants may not participate in the motivational boot camp program unless they agree to be bound by all the terms and conditions thereof and indicate their agreement by signing a memorandum of understanding.

(d) Qualifications to participate.—Satisfying the above qualifications to participate does not mean the inmates will automatically be permitted to participate in the program.

(e) Expulsion from program.—The inmate's participation in the motivational boot camp unit may be suspended or revoked for administrative or disciplinary reasons. The department shall develop regulations consistent herein.

§ 1127. Completion of motivational boot camp program

Upon certification by the department of the inmate's successful completion of the program, the Pennsylvania Board of Probation and Parole shall immediately release the inmate on parole, notwithstanding any minimum sentence imposed in the case. The parolee will be subject to intensive supervision for a period of time determined by the board, after which he will be

subject to the usual parole supervision. For all other purposes, the parole of the inmate shall be as provided by the act of August 6, 1941 (P. L. 861, No. 323), referred to as the Pennsylvania Board of Probation and Parole Law.[1]

§ 1128. Appeals

Nothing in this act shall be construed to enlarge or limit the right of an inmate to appeal his or her sentence.

§ 1129. Repeals

All acts and parts of acts are repealed insofar as they are inconsistent with this act.

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[1] 61 P.S. § 331.1 et seq.

CODE OF FEDERAL REGULATIONS
TITLE 28-JUDICIAL ADMINISTRATION
CHAPTER I-DEPARTMENT OF JUSTICE
PART 35-NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

SUBPART B-GENERAL REQUIREMENTS
Current through February 9, 1998; 63 FR 6614

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability —

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant

assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections —

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

SUBPART D — PROGRAM ACCESSIBILITY

Current through February 9, 1998; 63 FR 6614

§ 35.150 Existing facilities.

(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not —

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service program, or activity or

would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) Methods —

(1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required

because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) Transition plan.

(1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum —

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.